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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1840

IN RE GRAND JURY PROCEEDING,
JACKIE WAYNE SCARBOROUGH,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioner, JACKIE WAYNE SCARBOROUGH respectfully prays that this Court issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 20, 1980.

CITATIONS TO OPINIONS BELOW

On September 19, 1979, the United States District Court for the Western District of Texas, El Paso Division entered a judgment of civil contempt and order of confinement pursuant to 28 U.S.C. §1826 against JACKIE WAYNE SCARBOROUGH, Petitioner, (reproduced as Appendix A, Infra). On December 5, 1979,

the United States Court of Appeals for the Fifth Circuit reversed and remanded that cause for further hearings. This opinion was reported as *In Re Scarborough*, 608 F.2d 640, (5th Cir. 1979) and reproduced herein as Appendix B. Upon remand, the District Court issued a *Memorandum Opinion and Order*, again upholding the judgment of contempt and order of confinement, (reproduced herein as Appendix C). This *Opinion* was affirmed by the United States Court of Appeals for the Fifth Circuit on February 20, 1980. This opinion was published as *In Re Scarborough*, 613 F.2d 62, (5th Cir. 1980) and is reproduced herein as Appendix D.

JURISDICTION

The judgment of contempt and order of confinement entered against this Petitioner by the District Court was affirmed by the United States Court of Appeals for the Fifth Circuit on February 20, 1980. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The filing of this *Petition* is timely under 28 U.S.C. §2101(c), respecting petitions for writs of certiorari in civil cases arising from the Federal Courts of Appeal.

QUESTIONS PRESENTED

1. Whether the Fifth Amendment protects an immunized Grand Jury witness who asserts a fear of foreign prosecution and who persists in claiming his privilege against self-incrimination.

2. Whether F.R.Cr.P. 6(e) can supplant the privilege against self-incrimination as to foreign prosecution by rendering such foreign prosecution merely conjectual or speculative because of Rule 6(e)'s general requirement of secrecy.

3. Whether F.R.Cr.P. 6(e)'s secrecy requirement is an irrebuttable presumption so as to preclude a witness from offering evidence to the effect that Rule 6(e) is in fact being violated in the instant district, before the instant grand jury, and by the instant United States Attorney.

4. Whether the Government's Denial of Electronic Surveillance was sufficient.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The United States Constitution, Amend. V, provides in pertinent part:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of . . . liberty . . . without due process of law . . . .

2. 18 U.S.C. §6002 provides in pertinent part that:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to

testify or provide other information in a proceeding before or ancillary to (1) a court or grand jury of the United States . . . and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

3. 28 U.S.C. §1826(a) provides in pertinent part that:

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify . . . the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of (1) the court proceeding, or (2) the term of the grand jury, including extensions, before

which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

4. Federal Rule of Criminal Procedure 6(e) states in pertinent part:

(2) Exceptions. —

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to —

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce Federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury

whose material has been so disclosed, with the names of persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made —

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

STATEMENT OF THE CASE

A. Introductory Facts

This cause revolves around a criminal endeavor which came to grief in March of 1976, in a fiery airplane crash near Presidio, Texas, which is located on the United States side of the bordern of the Republic of Mexico, (RI 44; RIII 40). An amount of marijuana was thought to be on board the aircraft. (RI 37-44; RIII 40). The Petitioner was alleged to be the pilot of that aircraft.

B. The Federal Grand Jury in El Paso, Texas

On September 18, 1979, pursuant to a subpoena served on him in Michigan, Jackie Wayne Scarborough appeared before a Federal Grand Jury in the border city of El Paso, Texas, and invoked his Fifth Amendment rights against self-incrimination, (RI 3-4). Subsequently, an order granting use immunity pursuant to 18 U.S.C. §6002 was obtained from the District Court and served on Petitioner, (RI 33-35). However, Petitioner persisted in asserting his Fifth Amendment rights (RI 35). The Petitioner was brought before the District Court within two hours to show cause why he should not be held in contempt pursuant to 28 U.S.C. 1826, (RI 2-4, 54; *In Re Scarborough* (I), 608 F.2d at 642). The Petitioner's counsel plead lack of "notice" and "opportunity to prepare," (RI 5, 11, 12, 15, 18), and poised among other defenses a "Fear . . . of foreign prosecution in . . . a foreign nation, that of Mexico," (RI 17, 18). Counsel for the government was permitted to call and question witnesses, (RI 35), but counsel for Petitioner was not permitted to cross-examine or otherwise participate, (RI 35, 45). Counsel for Petitioner then asked for an opportunity to present evidence substantiating his "just cause" defenses, (RI 51, 52), but the court refused, (RI 51). Thereafter, the Petitioner was adjudged in contempt and ordered confined, (RI 53-54; App. A).

C. Upon Appeal *(Scarborough (I))*.

The United States Court of Appeals remanded, holding:

> We decline to establish a firm test of how long a witness must be given before a contempt hearing; we simply hold that here, under all the circumstances, inadequate time was presented. * * * Because the district court never allowed Brummitt to present his defenses . . . we remand his case *along with that of Scarborough*, see discussion *infra*, to give him an opportunity to raise any other matters, whether as defenses or in mitigation, . . . he wishes to present. (Citations omitted) (Emphasis added) *Scarborough (I)*, 608 F.2d at 643.

However, the Court sided with the District Court in holding that a "fear of foreign prosecution" was no defense to 28 U.S.C. 1826:

> Despite this holding, we partially affirm the district court's order because to date Brummitt has presented no proper cause for his refusal to testify. In his brief he has proffered two reasons for his action; neither is a valid defense. * * * We reaffirm the holding of these cases that a grand jury witness is adequately protected against the leak of his testimony by the district court's power to prevent such disclosure. *See* Fed.R.Crim.P. 6(e).

D. Upon Remand in the District Court

Notwithstanding the above holding, the Petitioner again sought to introduce evidence in support of his "fear of foreign prosecution," (RIII 42-43), but was rebuffed by the District Court:

> THE COURT: All right, Mr. Roberts, Respondents' Exhibit D submitted by both respondents, a Joint Offer of Proof concerning the threat of foreign prosecution will be made a part of the record. You are correct in stating that it is my opinion that the Fifth Circuit has considered the question of whether the fear of foreign prosecution can be a defense and has ruled that it is not. But you want this in the record for the purpose of any additional remedy you might seek, including certiorari to the Supreme Court of the United States. (RIII 44)

The *Joint Offer of Proof* was introduced without objection from the government (RIII 42-44), and read as follows:

a. That the questions would have disclosed Mexican crimes:
   i. That Mexican Criminal Law prohibits such activities and prescribes harsh criminal punishments;
   ii. That Mexican Criminal Law can encompass in absentia prosecutions;

iii. That the Republic of Mexico would not feel itself bound by immunity granted by the United States;

iv. That the Republic of Mexico does not have a privilege against self-incrimination, so that if these matters were to become known even generally, the Appellant might be compelled to give testimony against himself under penalties which this Appellant would prefer not to describe;

v. That Mexican Courts will not examine how the person of a Defendant was brought before them;

b. That the questions obviously subjected him to such prosecution, and even if reworded would raise the specter of waiver of his Fifth Amendment rights;

c. That the press was closely covering this Grand Jury in general, and this Appellant's testimony in particular, even to the point of reporting snatches of conversations between himself and Counsel conferring outside the Grand Jury Room;

d. That the United States Attorney and his Assistants had exacerbated this "inquiry by headline" through leaking information about the matters which were occurring within the Grand Jury, sometimes in attributed interviews;

e. That the United States Attorney could lawfully leak information of this Appellant's Grand Jury testimony to the appropriate Federal Administration, the Drug Enforcement Administration, under F.R.Cr.P. 6(e)(2);

f. That the Drug Enforcement Administration in El Paso, Texas, a city located on the Mexican border, cooperates closely and shares information with Mexican Drug Enforcement Agencies;

g. That neither the Government, (RI 18, et seq), nor the Court, (RI 18, et seq), would guarantee that they would oppose any attempt to release this information to a foreign nation, but only that a hearing would be held prior to release, (RI 24);

h. That Appellant's Grand Jury testimony would be mandatorily released under 18 U.S.C. §3500 to any Defendant against which these Appellants might be required to give evidence. (Resp. Exhibit D, pp. 1-2)

E. Upon the Second Appeal Before the Fifth Circuit, *Scarborough II*

Upon appeal, the Petitioner argued that the *Offer of Proof*, (Resp. Ex. D.; App. E) was at the very least a prima facie case that Rule 6(e) would not protect his rights against self-incrimination and that in any case the rule

was in fact being violated before the Grand Jury in question and by the United States Attorney in question, (See *Joint Supplementary Brief*, (pp. 8-19)). The Fifth Circuit rejected this proposition:

> In our prior opinion, we relied on precedent to hold that the fear of foreign prosecution is not a defense to contempt for refusal to testify . . . Even if we were to entertain such a defense in this circuit, *cf. In re Federal Grand Jury Witness (Lemieux)*, 597 F.2d 1166, 1168-69 (9th Cir. 1979) Hufstedler, concurring specially), appellants' offer of proof has not presented a sufficient showing that they will be prosecuted by a foreign sovereign or that the protections of rule 6(e) will be inadequate to prevent the disclosure of incriminating testimony. *Scarborough (II)*, 513 F.2d at 64.

Thus, the Petitioner brings his cause to this Court, having failed four times before the trial and Appellate Courts to gain permission to present evidence in support of his defense of foreign prosecution.

REASONS WHY THE WRIT SHOULD BE GRANTED

I

A Valid Fear Of Foreign Prosecution Is Encompassed Within The Protection Against Self-Incrimination Guaranteed By The Fifth Amendment Of The United States Constitution.

Since *Murphy v. Waterfront Commission*, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964), the United States has been on record as upholding the right to assert the Fifth Amendment privilege against self-incrimination in the Courts of one sovereign as against prosecution in the Courts of a different sovereign: In *Zicarelli v. New Jersey Investigation Commission*, 406 U.S. 472, 92 S.Ct. 1670, 32 L.Ed.2d 234 (1972), the Supreme Court commented:

> Appellant further asserts that he cannot be compelled to testify before the Commission because his testimony would expose him to danger of foreign prosecution. He argues that he has a real and substantial fear of foreign prosecution, and that he cannot be compelled to incriminate himself under foreign law. It follows, he insists, that he cannot be compelled to testify, irrespective of the scope of the immunity he receives, because neither the New Jersey statute nor the Fifth Amendment privilege can prevent either prosecution or use of his testimony by a foreign sovereign. This court noted probable jurisdiction to consider appellant's claim that a grant of immunity cannot supplant the Fifth Amendment privilege with respect to an individual who has a real and substantial fear of foreign prosecution. We have concluded, however, that it is unnecessary to reach the constitutional question in this case. *Zicarelli*, 406 U.S. at 478.

The Supreme Court did not decide the salient question above because the Court found that his "fear of foreign prosecution" was held only to the "abstract," because the actual questions did not involve foreign activities nor did the record show that the State Commission was interested in inquiring into foreign areas, *Zicarelli*, 406 at 479-480. Because of this, the Supreme Court was able to conclude that Zicarelli "was never in real danger of being compelled to disclose information that might incriminate him under foreign law." *Zicarelli*, 406 U.S. at 480. As the District Court in *Cardassi* noted:

> Nothing in *Zicarelli* impairs the *Murphy* rule that the privilege can be asserted in the forum of one sovereign to guard against prosecution in the courts of another sovereign. *Zicarelli* simply applies to this rule the traditional limitation that the fear of foreign prosecution must be "real" and not a "remote and speculative" possibility. 406 U.S. at 478, 92 S.Ct. 1670. That test is met in this case. *Cardassi*, 351 F.Supp. at 1085.

The *Cardassi* Court went on to find that the witness appearing before the Federal Grand Jury in that case had a valid fear of foreign prosecution, (*Cardassi*, 1083-1084), and thus could not be held in contempt, (*Cardassi*, at 1086). In that case, the theory that F.R.Cr.P. Rule 6(e) is sufficient in the abstract to rebut any claim of valid fear of foreign prosecution was assailed:

The inability of American courts to use Rule 6(e) as an effective protection for this witness against foreign use of her compelled testimony is highlighted by comparison with the ability the courts do have to enforce within this country the derivative use prohibition of 18 U.S.C. §6002. If a federal or state prosecuting official attempts to use evidence obtained directly or derivatively from a witness compelled to answer after receiving use immunity, the courts of this country have the power to make sure that such evidence is excluded, or that any conviction thereby obtained is set aside. See *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972); see also *Murphy v. Waterfront Commission*, 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678 (1964). The prospect feared by the witness in such circumstances is within the ultimate control of federal and state trial courts, with direct and collateral review available culminating in the Supreme Court. Such control can be relied upon to provide "very substantial protection" against use of compelled testimony against a witness in domestic courts. *Kastigar v. United States*, Supra 406 U.S. at 461, 92 S.Ct. 1653; but see id. at 469 (dissenting opinion of Justice Marshall). The existence of this judicial control was what persuaded the Court in *Kastigar* that the self-incrimination privilege could be displaced by a grant of use immunity. "A person accorded this immunity

> under 18 U.S.C. §6002, and subsequently prosecuted, is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities." Id. at 460, 92 S.Ct. 1653, 1665. Rule 6(e) provides no similar protection, yet it is the sole safeguard the Government can offer a witness who fears his compelled testimony may be used against him in foreign courts where the domestic judicial ban on use and derivative use of compelled testimony is unenforceable.

Since *Cardassi*, other Court have cautiously considered "fear of foreign prosecution" in regard to witnesses before Federal Grand Juries; however, in these cases the facts involved the same impediment seen by the Supreme Court in *Zicarelli*, the failure to demonstrate that the actual questions involved matters upon which foreign prosecution could be based:

> The investigation here involved Quinn's alleged purchase in New Hampshire of firearms which were later found in Ireland. However, the questions put to Quinn focus upon activities within New Hampshire or, at least, the United States. Quinn does not assert that his answers might disclose that he engaged in compromising conduct while present on British soil and subject to British criminal jurisdiction. Furthermore, with perhaps very narrow exceptions, see *United States v. Honneus*,

> 508 F.2d 566, 571 & n. 3 (1st Cir. 1974), cert. denied, 421 U.S. 948, 95 S.Ct. 1677, 44 L.Ed.2d 101 (1975), a nation's criminal laws do not operate extra-territorially. Quinn has not identified any British criminal statute under which he reasonably fears prosecution for conduct to which the questions might relate. See *In Re Cardassi*, 351 F.Supp. 1080, 1084 (D. Conn. 1972).

Similar approaches were utilized by the Second Circuit in *United States v. Yanagita*, 552 F.2d 940, 946 (2nd Cir. 1977); and by a District Court in *United States v. Doe*, 361 F.Supp. 226, 227 (D.C. Penn. 1973). Only this Circuit, *United States v. Tierney*, 465 F.2d 806 (5th Cir. 1972) and the Tenth Circuit *In Re Parker*, 411 F.2d 1067 (10th Cir. 1969) vacated as moot sub nom. *Parker v. United States*, 397 U.S. 96, 90 S.Ct. 819, 25 L.Ed.2d 81 (1970), appear to regard Rule 6(e) as somewhat of an absolute ban to raising a defense of foreign prosecution. However, it must be noted that both *Parker* and *Tierney* may be construed much more narrowly than the extreme position noted above. Both of these cases can easily be seen as holding that the level of proof in those particular cases was insufficient to overcome the protection afforded by Rule 6(e). In our case, the facts are much stronger than that adduced in either *Tierney* or *Parker*.

II

The Petitioner Has Demonstrated A Valid Fear Of Foreign Prosecution.

This *Joint Offer of Proof* was accepted by the Court without objection from the Government, (RIII 43-44). Thus, the Petitioner stands in the strongest position of any similar witness considered by the Courts, even stronger than Cardassi. There can be no question that the inquiry directly involved criminal activities "in Mexico," (RI 44); and that the activities were punishable under Mexican Law, see Codigo Penal Mexicano, Arts. 195, 197 (1967 Amendments) cited in *Cardassi*, 351 F.Supp. at 1084, even without the *Offer of Proof*. However, through the *Joint Offer of Proof* the Petitioner offered to go even further and to show how his testimony would be "legally" transferred to the Republic of Mexico through the provision of F.R.Cr.P. Rule 6(e)(2)(a), (see Offers of Proof "e" and "f", Resp. Exhibit D); and that his testimony would be legally released to Defendants against whom this Petitioner would be required to testify, 18 U.S.C. §3500, (see Offer of Proof "h", Resp. Exhibit D). And finally, the Petitioner offered to go the full mile and prove that this United States Attorney was *actually* violating Rule 6(e) before this Grand Jury (see Offer of Proof "d", Resp. Exhibit D). Such was the level of proof offered by the Petitioner.

Considering only the last point, the Petitioner feels that this offer is sufficient in itself. Rule 6(e) can be characterized as mandating that the "barn door" be

closed: the Petitioner is offering to prove that in the Western District of Texas that that "barn door" is in fact wide open. Is reality such a fragile thing that it cannot withstand a contrary commandment in print? Without becoming overly philosophical, it would appear that this District Court's position is that the rule controls and negates whatever reality the Petitioner could prove in Court. This smacks of the practices employed in many societies in the eastern half of our world where historical and physical facts are routinely ignored or altered in adherence to a certain rule, law, or theory. Surely, we have not gone so far as that, or rather, we are not so far gone as that.

III

F.R.Cr.P. 6(e) By Itself Cannot Logically Or Legally Extinguish The Fifth Amendment Rights Of A Grand Jury Witness.

In attacking the validity of the foreign prosecution defense, the Government relied on the holding of *In Re Tierney*, 465 F.2d 806 (5th Cir. 1972), Appellee's *Brief* at p. 7, which held generally on the facts before it, that witness Tierney was protected from foreign prosecution by the strict secrecy provision of F.R.Cr.P. Rule 6(e) as it existed in 1972, *Tierney*, at 811. Before explaining why this is not the case under Rule 6 as it exists today, and under the facts in our case, the Petitioner feels compelled to take issue with the basic premise of *Tierney* that Rule 6(e) could supplant an otherwise genuine Fifth Amendment right by posing "no substantial

risk of foreign prosecution," *Tierney*, at 811. First of all the Petitioner would ask this Court to consider what is involved in a situation of federal immunity versus foreign prosecution. The standard immunity order in our case does not deal with foreign prosecutions. It does not even make an empty promise in that regard. So therefore, the immunity document is not any protection of one's Fifth Amendment privileges as to foreign prosecution. Thus, we are left with only Rule 6(e). Rule 6(e) is merely a Rule of Court procedure enforceable by contempt. The 1972 Rule 6(e) prescribed almost absolute non-disclosure. To say that this Rule forbidding disclosure renders any possibility of disclosure to a foreign nation insubstantial is tantamount to saying that a law prohibiting the importation of marijuana renders the possibility of this act actually occurring insubstantial. Aside from this theoretical aspect, this Court must note that improper disclosures do in fact occur.[1] Of course, these cases noted below are domestic cases where in a District Court or an Appellate Court has the opportunity to fashion a remedy for this breach of Rule 6(e). The Petitioner does not wish to demean the power of good faith of this Court, but he does not feel that this Court has the actual ability to enjoin a foreign prosecution, nor the willingness to lead some expeditionary

1 See *United States v. Dunham Concrete Products*, 475 F.2d 1241, 1249 (5th Cir. 1973); *United States v. District Court*, 238 F.2d 713 (4th Cir. 1956); *In Re Petroleum Industry Investigators*, 152 F.2d 646 (D.C. Va. 1957); *United States v. Hoffa*, 349 F.2d 20, 43 (6th Cir. 1965); *United States v. Brazzano*, 570 F.2d 1120 (3rd Cir. 1977); *United States v. Sweig*, 315 F.Supp. 1148 (D.C. N.Y. 1970), aff'd 441 F.2d 114 (2nd Cir. 1970); *United States v. Phillips Petroleum*, 435 F.Supp. 610 (D.C. Okla. 1977); *United States v. Borys*, 169 F.Supp. 366 (D.C. Alaska 1959); et cetera.

force to his rescue. And no one can assert that notification of the District Court's intention to cite the erring United States Attorney or Government agent for contempt would be an adequate remedy for some unfortunate in prison in Mexico, Turkey or wherever. In this light, Rule 6(e) can be clearly seen as mostly symbolic. It is a reed that has been broken in the past; that will be broken in the future; and that if broken in a situation of foreign prosecution, impossible to mend. The Petitioner is perplexed that the Government can contend that this slender reed can supplant a basic right guaranteed to him by the United States Constitution.

We now have a multitude of legal avenues to avoid Rule 6(e)'s general prohibition against disclosure. Looking at the probabilities and possibilities of disclosure of this Petitioner's Grand Jury testimony, we find the following major areas: (1) sharing of law enforcement information within the Government, 6(e)(2)(A); (2) direct release of the testimony for use in a foreign prosecution under Court order, 6(e)(2)(C)(i); (3) mandatory release to future Defendants under the Jencks Act, 18 U.S.C. §3500; (4) improper disclosure by the United States Attorney or Government agent in violation of Rule 6(e).

(1) Sharing of Law Enforcement Information Within the Government.

The Amendments to Rule 6(e) authorize a Government attorney to disclose whatever Grand Jury proceedings that he deems necessary to various other

Government personnel whenever he decides that such disclosure would be helpful in enforcing Federal criminal law. Observers have noted that "thus far, this exception has been liberally construed in the Government's favor," (footnote omitted), note, 1977-1978 Term Criminal Law and Procedure, 67 Geo. L. J. 203 (1978). In our case, this exception would permit the Government to disseminate the Petitioner's testimony directly to the Drug Enforcement Agency without Court order or notice to any party. As pointed out in the Appellant's *Brief in Chief*, at p. 27, the Petitioner, if allowed to produce evidence, would have attempted to demonstrate that the Drug Enforcement Agency regularly shares narcotic information of mutual interest with its Mexican counterparts, and indeed is required to do so by various treaties, protocols and agreements. In addition, it is not uncommon for Mexican narcotics officers to be assigned to stations in the United States and vice-versa. Thus, there is a high probability that a formal or informal transfer of this information would occur.

(2) Direct Release of the Testimony for use in a Foreign Prosecution Under Court Order.

At the "hearing," the District Court promised a hearing before releasing the Petitioner's testimony for a foreign prosecution, (RI 47). Looking ahead, the Petitioner is at a loss to see how he could prevent such a Court-ordered disclosure. Could the Petitioner contend that his personal interest in not being prosecuted for a crime he committed transcends the national interest in furthering cooperation with a friendly nation engaged in the mutual and cooperative activity of attempting to staunch the flow of narcotics between itself and the United States? Nor could the Petitioner contend that the Government had promised him that it would not use his testimony in a foreign prosecution? In fact, the immunity Order does not promise this, nor did the Prosecutor promise this at the Petitioner's hearing. Indeed, the Prosecutor remained conspicuously silent when Petitioner's Counsel verbalized his client's fears of foreign prosecution, (RI 18, et seq.). Nor could this Petitioner claim that the District Court had promised him that the Court would oppose release of his testimony to a foreign prosecution. In fact, the District Court pointedly promised only that the Court would not release the testimony "until such time as in fact there has been a hearing before such order is entered," (RI 47). Considering the extent of the "hearing" accorded him at this cause, and considering that at this point he has no valid defenses to nondisclosure, the Petitioner finds this promise of hearing before release small comfort.

(3) Mandatory Release to Future Defendants under the Jencks Act, 18 U.S.C. §3500.

In addition to the above problem, the Petitioner can not help but foresee an unavoidable disclosure of his testimony. The Government's intentions as to this investigation are totally transparent. The Government intends to seek an indictment through the Petitioner's immunized testimony in the Grand Jury and there-

after to seek convictions of various individuals through the immunized testimony of this Petitioner at trial. The problem with this time-worn procedure is that it will release this Petitioner's testimony under 18 U.S.C. §3500, *United States v. Rivero*, 532 F.2d 450, 459-61 (5th Cir. 1976), to the possession of those whose interests would be adverse to his since the Petitioner would be testifying against them. Thus by actual statutory mandate, this Petitioner's self-incriminating statements would be delivered into the hands of those who would then be his enemies.

(4) Improper Disclosure by the United States Attorney or Government Agent in Violation of Rule 6(e).

Besides these lawful avenues of disclosure, we still have the possibility of improper disclosure now multiplied by the number of Government attorneys, Government agents, Government consultants et cetera, who could be lawfully privy to the Petitioner's testimony. In addition, the Petitioner would again point out the impossibility of using Rule 6(e) to remedy a foreign prosecution occurring as a result of improper disclosures.[2] Neither the District Courts, nor

2. The effect of utilizing Rule 6(e) to supplant Fifth Amendment privileges in regard to foreign prosecutions can be clearly seen by analogy. If the Federal Government enacted a statutory scheme which compelled citizens to incriminate themselves before law enforcement officials, coupled with a prohibition against, punishable by contempt, but with no limit of the use of improperly disclosed testimony in subsequent prosecutions, would this supplant a citizen's Fifth Amendment rights. Likewise, would a limited immunity grant, a grant which only offered immunity before that particular Federal Grand Jury, be sufficient to overcome a witness's Fifth Amendment privileges given the secrecy mandates of 6(e)?

the Circuit Courts have any power to impede, enjoin, or dismiss foreign judicial proceedings. However, the Petitioner need not rely exclusively on the myriad possibilities of improper disclosure, because his defense would have involved a showing that the United States Attorney was routinely making improper disclosures of matters before this Grand Jury to the news media, (See Appellant's *Brief in Chief*, p. 27.) Thus, the Petitioner would have endeavored actual improper disclosures as well as the possibilities of such disclosures. Holding that Rule 6(e) protects the witness may be permissible as a starting principle, but can this principle overcome an opposite reality? Holding that this Petitioner's fear of foreign prosecution is without substantial basis in a situation when he was prohibited from substantiating it, is tantamount to holding that the defense is insubstantial under any set of facts.

IV

The Government's Denial Of Electronic Surveillance Was Not Sufficient

At the second contempt hearing on December 18, 1979, the Petitioner made an assertion that the questions propounded to them were the result of illegal wiretaps, and in support of this position made representations to the Court and introduced documents showing federal investigation of the Petitioner Brummitt's attorneys and a particular interest in their

telephones. Petitioners provided a list of telephone numbers and addresses of themselves and their attorneys. In response, the Government filed an affidavit which stated: "There has been no 'wire tap' or electronic surveillance on the above-named individuals originating from a federal agency in the Western District of Texas during the time period involved, being March 1976 to the present . . . (but) . . . The Government is unable to advise the court at this time of electronic surveillance conducted outside the Western District of Texas." (See Government Affidavit — Appendix F)

The Appellants had made a colorable claim of an illegal electronic interception which not only violated 18 U.S.C. §2515, but also the Attorney-client privilege. However, the Government's reply was carefully crafted to include only the Western District of Texas, even though both Appellants and one Attorney reside outside of the Western District of Texas. This is clearly not a sufficient response.

On the other hand, where a timely claim is asserted and the government's response is inadequate to determine the existence of illegality but the witness nonetheless is required to testify and is then held in contempt for refusing to do so, the contempt charges must be vacated. See *Gelbard v. United States*, supra; *In Re Quinn*, 525 F.2d 222 (1st Cir. 1975). *United States v. Yanagita*, 552 F.2d 940 (2nd Cir. 1977)

CONCLUSION AND PRAYER

Wherefore, the above premises considered, the Petitioner, JACKIE WAYNE SCARBOROUGH, respectfully prays that this Court issue a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 20, 1980.

RESPECTFULLY SUBMITTED,

THOMAS P. RABETTE
Attorney for Petitioner
RABETTE & O'DEA, P.C.
2242 S. Telegraph Rd.
Bloomfield Hills, MI 48013

CERTIFICATE OF SERVICE

The undersigned attorney of record for Petitioner, JACKIE WAYNE SCARBOROUGH, hereby certifies as follows:

(a) That an Application for my Admission to the bar of the United States Supreme Court is pending, and that I have duly served all parties required by the Rules of said Court to be served with the foregoing Petition for Writ of Certiorari, as hereinafter shown:

(b) That the names and addresses of the attorneys of record for the adverse party are as follows:

The Honorable Wade H. McCree, Jr.
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Jamie Boyd
c/o LeRoy Morgan Jahn
Assistant U.S. Attorney
U.S. Attorney's Office
655 E. Durango Blvd.
Hemisfair Plaza
San Antonio, Texas 78206

(c) That on this day I served three printed copies of the foregoing Petition for Writ of Certiorari on the said Wade H. McCree, Jr., and the said Jamie Boyd, attorneys for said Respondent, by depositing same in the United States Post Office, with first class postage prepaid, properly addressed to said attorneys for Respondent at their said addresses.

EXECUTED, this ____ day of May, 1980.

THOMAS P. RABETTE
Attorney for Petitioner
2242 So. Telegraph Road
Bloomfield Hills, MI 48013
(313) 333-7931

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

IN RE:
GRAND JURY PROCEEDINGS

Filed: Sept. 19, 1979

ORDER

Came on to be considered the Motion of the Government concerning the alleged contempt of the said Jackie Wayne Scarborough, and upon hearing in open Court, and it appearing that the said Jackie Wayne Scarborough has refused and is continuing to refuse to obey the lawful orders of this Court;

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the said Jackie Wayne Scarborough is hereby committed to the custody of the Attorney General for confinement until such time as the said Jackie Wayne Scarborough will appear before the Federal Grand Jury and purge himself of contempt or until the term of the Grand Jury expires on August 12, 1980.

SIGNED AND ENTERED this the 19th day of September, 1979, at 9:20 a.m.

/s/ William S. Sessions
WILLIAM S. SESSIONS
UNITED STATES DISTRICT
JUDGE

U.S. MARSHALL'S RETURN

Received this order on the 19th day of September, 1979 at El Paso, Texas and on September 19, 1979 executed same by committing the within named Jackie Wayne Scarborough to the custody of the Warden F. C. I. LaTuna as I am herein commanded.

RUDY A. GARZA,
U.S. Marshall
Western District of Texas

/s/ TERRENCE F. CURRY
TERRENCE F. CURRY,
DEPUTY

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE: GRAND JURY PROCEEDINGS,
DAVID BRUMMITT,
Appellant.

and

IN RE: GRAND JURY PROCEEDINGS,
JACK WAYNE SCARBOROUGH,
Appellant.

Nos. 79-3272, 79-3273
Summary Calendar.*

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* Fed. R. App. P. 34(a); 5th Cir. R. 18.

Appeals from the United States District Court
for the Western District of Texas

(DECEMBER 5, 1979)

Before BROWN, Chief Judge, TJOFLAT and FRANK M. JOHNSON, JR., Circuit Judges.

TJOFLAT, Circuit Judge:

David M. Brummitt and Jack W. Scarborough both appeal from adjudications of civil contempt for failure to testify before a federal grand jury after having been granted use immunity pursuant to 18 U.S.C. §§6002, 6003 (1976).[1] Both were incarcerated and denied bail

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1 Sections 6002 and 6003 state:

§6002. *Immunity generally*

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to —

(1) a court or grand jury of the United States,
(2) an agency of the United States, or
(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

pending expedited appeal. 28 U.S.C. §1826 (1976).[2] See

§6003. *Court and grand jury proceedings*

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, in an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment —

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

2 Section 1826 provides:

§1826. *Recalcitrant witnesses*

(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of —

(1) the court proceeding, or

(2) the term of the grand jury, including extensions,

before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months.

(b) No person confined pursuant to subsection (a) of this section shall be admitted to bail pending the determination of an appeal taken by him from the order for his confinement if it appears that the appeal is frivolous or taken for delay. Any appeal from an order of confinement under this section shall be disposed of as soon as practicable, but not later than thirty days from the filing of such appeal.

In Re Grand Jury Proceedings (Gravel), 605 F.2d 750, 752 n.1 (5th Cir. 1979) (per curiam).

Brummitt claims on appeal that the district court erred in not granting him adequate notice and time to prepare for the contempt hearing and in not permitting him to present witnesses to support his claim of just cause not to testify. Scarborough similarly contends his rights were violated by the manner in which he was found in contempt. We remand for further proceedings.

I

On September 18, 1979, Brummitt and Scarborough each appeared before a grand jury in El Paso, Texas. The grand jury was investigating the crash in Marfa, Texas of an airplane loaded with marijuana. Because of the differing facts that gave rise to the two contempt orders, we consider the contentions of Brummitt and Scarborough separately.

A

Brummitt, a non-Texas resident, appeared before the grand jury pursuant to a subpoena. Joseph Abraham, Jr., Brummitt's attorney of record, was unavailable due to a federal criminal trial in Santa Fe, New Mexico, and Charles L. Roberts, Abraham's associate, was also detained in court proceedings. Richard Esper, from another law office, represented Brummitt outside the grand jury room.

Shortly after Brummitt entered the grand jury room on September 18, he invoked his fifth amendment rights. At 10:33 a.m. the same day the district court signed an immunity order under 18 U.S.C. §6002. The order was served on Brummitt in the grand jury room; he proceeded to answer a few questions but once again pled the fifth after consulting with Esper. The Assistant United States Attorney then explained the scope of the immunity order to Brummitt; however, Brummitt, on the advice of counsel, continued to refuse to answer the grand jury's questions. The Government immediately filed a suggestion of contempt with the district court; at 11:30 a.m. the court set a hearing on the matter for 1:45 that afternoon.

During the lunch hour, attorney Roberts learned of Brummitt's predicament and appeared at the contempt hearing to represent him. Roberts moved for a continuance, claiming inadequate time to prepare a defense to the contempt charge. He suggested that with time to prepare he would show Brummitt had "just cause" for refusing to answer because of: (1) the Government's allegedly improper purpose of calling him before the grand jury to testify regarding already indicted offenses, and (2) the risk that he might be subject to foreign prosecution because of the potential leak of his testimony and the limited scope of the immunity order. The court denied the motion for continuance and refused to hear the defenses, stating that they

could subsequently be raised in a habeas corpus proceeding. At the conclusion of the brief hearing the court found Brummitt in contempt and ordered his incarceration.

Although Brummitt points in his brief to the potential merit of his defenses, fear of foreign prosecution and improperly motivated grand jury questioning, he was not permitted to develop either matter at the district court hearing, so the record is barren of support for them. The essence of his appeal is his argument that he was entitled to more than two hours notice of the contempt proceeding and that he should have been allowed to present evidence therein.

In our view, the district court erred when it so rapidly disposed of Brummitt's case. While lack of notice claims have at least twice before been rejected by us, *see In Re Grand Jury Proceedings (Postal)*, 559 F.2d 234, 237 (5th Cir. 1977) (per curiam), *cert. denied*, 434 U.S. 1062, ____ S.Ct. ____ (1978); *In Re Tierney*, 465 F.2d 806, 813-14 (5th Cir. 1972), *cert. denied*, 410 U.S. 914, 93 S.Ct. 959 (1973), in both these cases we observed that adequate notice and time for preparation were present. Here, on the other hand, Brummitt, who was represented by substitute counsel, was accorded a minimal time for preparation. We decline to establish a firm test of how long a witness must be given before a contempt hearing; we simply hold that here, under all the circumstances, inadequate time was present. *See Brown v. Braddick*, 595 F.2d 961, 966 n.7 (5th Cir. 1979).

Despite this holding, we partially affirm the district court's order because to date Brummitt has presented no proper cause for his refusal to testify. In his brief, he has proffered two reasons for his action; neither is a valid defense. First, the risk of foreign prosecution claim was rejected by us in both *In Re Tierney* and *In Re Grand Jury Proceedings (Postal). Accord, e.g., In Re Federal Grand Jury Witness (Lemieux),* 597 F.2d 1166 (9th Cir. 1979) (per curiam). We reaffirm the holding of these cases that a grand jury witness is adequately protected against the leak of his testimony by the district court's power to prevent such disclosure. *See* Fed. R. Crim. P. 6(e). Second, the Government specifically denied any improper motivation behind the grand jury questioning, Contempt Hearing Transcript at 10. Absent some allegation of harassment or prosecutorial misconduct, neither of which is present here, such a denial is sufficient. *See In Re Grand Jury Investigation (McLean),* 565 F.2d 318, 320-21 (5th Cir. 1977). Because the district court never allowed Brummitt to present his defenses, however, we remand his case along with that of Scarborough, see discussion *infra,* to give him an opportunity to raise any other matters, whether as defenses or in mitigation, *see In Re Grand Jury Proceedings (Gravel),* 605 F.2d 750, 752-53 (5th Cir. 1979) (per curiam), he wishes to present.

B

Scarborough, a Michigan resident, also appeared under subpoena. He was represented by his Michigan

attorney and had no problem with any substitution of counsel. On the morning of September 18, after Scarborough asserted his fifth amendment rights before the grand jury, the district court signed a use immunity order for him as well. When he still refused to answer a grand jury question, he was cited for contempt and given a hearing along with Brummitt at 1:45 p.m. The district court declined to adjudicate Scarborough in contempt for refusing to answer the one question he had been asked, and, consequently, Scarborough was returned to the grand jury. Further questions were put to him and, after consulting with counsel, he refused to answer. At 6:00 that evening, Scarborough again appeared before the district court, which ordered the Government to prepare a new suggestion of contempt. A second contempt hearing finally began at 8:30 o'clock the following morning, September 19. The district court refused to grant Scarborough a continuance and denied his counsel the opportunity to present any defenses. Scarborough was promptly held in contempt and ordered incarcerated.

The question of notice is closer here than it was for Brummitt. Original counsel represented Scarborough at all relevant times, and the final contempt hearing was held a day later than Brummitt's. Still, counsel had little time for preparation after the immunity order was entered, since the day of September 18 was spent either in court or on duty outside the grand jury room.

We need not decide the continuance issue, since in any event a remand is necessary to permit Scarborough to present any defenses he may have.

The language of 28 U.S.C. §1826 provides for the confinement of a recalcitrant witness who, *"without just cause shown"* (emphasis added), declines to testify in the face of a court order to do so. It seems axiomatic that before a district court may hold that a witness lacks just cause it must permit him to raise such defenses as he has to present. *See, e.g., In Re Grand Jury Investigation (Bruno),* 545 F.2d 385, 388 (3rd Cir. 1976). Here, such was not done.

In his brief, Scarborough has listed what he styles some thirteen potential defenses to any requirement that he answer the grand jury's questions. There being no development of these claims in the record below, we cannot properly evaluate them at this stage. Some clearly have no merit, such as the fear of foreign prosecution claim we have already considered in Brummitt's case, but fundamental fairness requires that Scarborough be permitted to raise them in the contempt proceeding below, and not in a collateral habeas corpus suit, so that they may be decided and then reviewed by us on appeal in an orderly fashion.

II

For the reasons set forth above, we remand these matters to the district court for it to consider such defenses as Brummitt and Scarborough may present to it.

We retain jurisdiction over these appeals, *see Osborne v. Coleman Co.,* 592 F.2d 1239, 1241 (5th Cir. 1979) (per curiam), and instruct the district court to make its rulings within twenty days. Brummitt and Scarborough shall be released on such bond as that court deems appropriate pending such rulings.

REMANDED WITH INSTRUCTIONS.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

IN RE: GRAND JURY PROCEEDINGS,
JACKIE WAYNE SCARBOROUGH,
Respondent.

EP-79-CR-156

IN RE: GRAND JURY PROCEEDINGS,
DAVID MICHAEL BRUMMITT,
Respondent.

EP-79-CR-157

MEMORANDUM OPINION AND ORDER

On July 3, 1979, the federal grand jury for the Western District of Texas, issued subpoenas to Respondent

JACKIE WAYNE SCARBOROUGH, a resident of Michigan, and Respondent DAVID MICHAEL BRUMMITT, a resident of Tennessee, to appear before the grand jury in El Paso, Texas, on August 7, 1979. For reasons not disclosed by the record, the actual appearance dates were changed to September 18, 1979. On that date, both Respondents appeared before the grand jury and declined to answer the questions propounded upon the grounds of possible self-incrimination. Upon motion of the Assistant United States Attorney, both were granted use immunity by the District Court pursuant to 18 U.S.C. §§6002 and 6003. When both persisted in refusing to answer the grand jury's questions, the Government moved the Court to hold each in contempt. (Tr. 3-4; 43-4.) After hearings on September 18 and 19, the District Court found both the Respondents to be in civil contempt, and ordered them incarcerated for the remaining term of the grand jury, or until each purged himself of contempt by answering the questions propounded. (Tr. 72-5.) The Respondents perfected expedited appeals to the United States Court of Appeals for the Fifth Circuit, contending that they were denied adequate notice and time to prepare for the contempt hearing, and that, if given the opportunity, each could present good defenses to the charge of contempt. The Court of Appeals retained jurisdiction over the appeals, but remanded to this Court for the purpose of holding a hearing and considering the defenses urged by Respondents. *In re Grand*

Jury Proceedings (Scarborough & Brummitt), ____ F.2d ____ (5th Cir. 1979) (Nos. 79-3272 and 79-3273, decided December 5, 1979). Pursuant to the Order of the Court of Appeals both Respondents were released on bond on December 10, 1979.

On December 18, 1979, this court afforded a hearing to both Respondents, and each was given the opportunity to spell out his defenses to the instant contempt proceeding. Allowing for slight variations in wording, the defenses raised fall into four categories: (1) the court should quash the subpoenas duces tecum issued to the Respondents; (2) Respondents are entitled to be informed of the grand jury's purpose and objectives in propounding these questions to them; (3) Respondents are entitled to be informed as to whether or not these subpoenas or the questions propounded by the grand jury were the product of any unlawful wiretap or electronic surveillance by the Government; (4) the use immunity granted by the District Court does not adequately protect them against foreign prosecution in the Republic of Mexico.

With respect to the first contention, it should be noted that counsel for Scarborough filed for the first time on December 8, 1979, a motion to quash the subpoena issued to his client on July 3, 1979. Although Brummitt's counsel did not file a written motion to quash, he stated at the evidentiary hearing that he adopted Scarborough's motion. The subpoenas chal-

lenged (Respondent's Exhibit "A") call upon the Respondents to appear in the United States District Court for the Western District of Texas to testify before the grand jury, and to produce certain records pertaining to the payment of bond fees to a professional bail bondsman between 1975 and 1978. Each subpoena further contains the following statement: "These records may be turned over to any Special Agent of the Criminal Investigation Division, Internal Revenue Service, in lieu of a personal appearance." Respondents contend that these are subpoenas duces tecum; that the subpoenas provide an alternative means for delivering the records sought to representatives of the Government, which would excuse their personal appearances; that they possess no such records, and cannot comply with the subpoena with respect to production of documents, and that, therefore, the subpoenas should be quashed and Respondents excused.

Had this point been timely raised, a serious question might have been presented. The carelessness of the United States Attorney's office in including in these subpoenas the final sentences thereof, tending to create an ambiguity where none should have existed, is not to be commended. However, Respondents do not explain why their motions to quash were not filed between July 3, 1979, the date of the subpoenas, and September 18, 1979, when Respondents appeared in person before the grand jury. Coming now, as it does, after all that has transpired in this case, Respondents' contention must be classified as sheer afterthought. *Piemonte v. United States,* 367 U.S. 550, 560 (1961). The Respondents have made personal appearances, been questioned by the grand jury, refused to answer, been given use immunity, again refused to answer, been adjudged in contempt, and appealed to the Fifth Circuit. It is now clear beyond question that the grand jury desires testimony from the Respondents, not just production of records (Tr. 52-66). The additional contentions that the subpoenas violate Respondents' Fourth Amendment rights, and that they are so broad and sweeping as to amount to a fishing expedition, are clearly without merit. The motions to quash the subpoenas should be denied.

Second, relying primarily upon *In re Grand Jury Proceedings,* 486 F.2d 85 (3d Cir. 1973) (*Schofield* I), and *In re Grand Jury Proceedings,* 507 F.2d 963 (3d Cir. 1975) (*Schofield* II), Respondents contend they should not be required to answer the grand jury's questions unless they are notified as to the specific purpose and objective of the grand jury's investigation. This is not the law in the Fifth Circuit. *In re Grand Jury Investigation, (McLean)* 565 F.2d 318, 320 (5th Cir. 1977). Every citizen owes to society the duty of giving testimony to aid in enforcement of the law. *Piemonte v. United States, supra,* 367 U.S. at 559, note 2. The Constitution requires no preliminary showing for the issuance of a grand jury subpoena to compel testimony, *United States v. Dionisio,* 410 U.S. 1 (1973); *United States v. Mara,* 410 U.S. 19 (1973), and this

Circuit has declined to impose any such requirement as an outgrowth of the district court's supervisory power over grand jury proceedings. *In re Grand Jury Investigation (McLean), supra.* Society has a strong interest in the grand jury's ability to obtain testimony concerning a matter under investigation, and the requirement of too many preliminary showings and mini-trials would frustrate that interest. *United States v. Dionisio, supra,* 410 U.S. at 17; *In re Grand Jury Proceedings (Gravel),* 605 F.2d 750, 752 (5th Cir. 1979); *In re Grand Jury Investigation (McLean), supra.* In the instant case, Government counsel has represented to the Court, on the record, that (1) neither Respondent is a target of the grand jury investigation, and (2) the testimony of Respondents is not desired for any improper purpose, such as gathering evidence for the trial of any case in which the grand jury has already returned an indictment. Respondents have not offered a scintilla of evidence as to any harrassment or prosecutorial misuse of the grand jury. See *In re Grand Jury Investigation (McLean), supra,* 565 F.2d at 320-21. Respondents' request for disclosure of the purpose of the grand jury investigation should be overruled.

Respondents next contend that the questions put to them by the grand jury might have been the product of illegal wiretaps, and they call upon the Government to deny it. It is well settled that no evidence derived from illegal wiretaps may be used in a grand jury proceeding, and that a grand jury witness refusing to answer

questions derived from such an illegal source has "just cause" for his refusal within the meaning of the contempt statute. *Gelbard v. United States,* 408 U.S. 41 (1972); *In the Matter of the Grand Jury (Vigil),* 524 F.2d 209, 213 (10th Cir. 1975). When a witness claims that the questions put to him are the product of an illegal wiretap, the Government is required to make an adequate denial. *Beverly v. United States,* 468 F.2d 732, 751-2 (5th Cir. 1972). What constitutes an "adequate denial," however, will vary according to the strength and specificity of the witness' claim. *United States v. Tucker,* 526 F.2d 279, 281-2 (5th Cir. 1976); *United States v. Stevens,* 510 F.2d 1101, 1105-6 (5th Cir. 1975). The claims of Scarborough and Brummitt in this case consist solely of Scarborough's unsworn motion for disclosure of electronic surveillance; a sworn motion to quash by Scarborough, alleging upon "information and belief" that the Government has engaged in illegal wiretaps; a list of telephone numbers associated with the Respondents and their attorneys, both past and present; and an exhibit disclosing that one attorney for one of the Respondents has had his telephone toll records subpoenaed by the grand jury (Respondents' Ex. "B"). In response, Government counsel has filed an affidavit stating that no questions propounded to Respondents were the product of any electronic surveillance, and that no federal agency in the Western District of Texas has engaged in any electronic surveillance of the individuals named since 1976 (Affidavit of Ronald P. Guyer, dated 12-21-79). In view of the general, unsubstantiated nature of Respondents' claims, the Govern-

ment's denial should be deemed sufficient. *United States v. Stevens, supra,* 510 F.2d at 1105.

Finally, Respondents submit a Joint Offer of Proof concerning their defense that the immunity conferred was insufficient to protect them from foreign prosecution in the Republic of Mexico. The Fifth Circuit has considered this defense and decided that it has no merit. *In re Grand Jury Proceedings (Brummitt and Scarborough), supra,* at pp. 5, 7, slip opinion.

This Court has considered all the defenses presented by both Respondents after remand, and finds all to be without merit. The contempt orders previously entered by the Honorable William Sessions, pursuant to 18 U.S.C. §1826, should be enforced as to both Respondents.

It is, therefore, ORDERED that this Memorandum Opinion and Order be forwarded to the United States Court of Appeals for the Fifth Circuit, for its consideration with Respondents' appeals.

It is further ORDERED that Respondents may remain at large under present bonds pending further action by the Court of Appeals.

SIGNED AND ENTERED THIS 26th day of December, 1979.

/s/ HARRY LEE HUDSPETH
HARRY LEE HUDSPETH
UNITED STATES DISTRICT
JUDGE

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN RE: GRAND JURY PROCEEDINGS,
DAVID BRUMMITT,
Appellant.

and

IN RE: GRAND JURY PROCEEDINGS,
JACK WAYNE SCARBOROUGH,
Appellant.

Nos. 79-3272, 79-3273
Summary Calendar*

Appeals from the United States District Court for the Western District of Texas

(February 20, 1980)

Before BROWN, Chief Judge, TJOFLAT and FRANK M. JOHNSON, JR., Circuit Judges.

TJOFLAT, Circuit Judge:

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* Fed. R. App. P. 34(a); 5th Cir. R. 18.

In *In re Grand Jury Proceedings (Brummitt and Scarborough)*, 608 F.2d 640 (5th Cir. 1979), this court retained jurisdiction over these appeals, while remanding the cause to the district court for a full consideration of the civil contempt defenses raised by the appellants, David M. Brummitt and Jack W. Scarborough. After a hearing on appellants' defenses, the district court found them in contempt for their failure to testify before a federal grand jury after having been granted use immunity pursuant to 18 U.S.C. §§6002, 6003 (1976). Brummitt and Scarborough now bring their defenses before this court.

The facts leading to the original adjudications of civil contempt are stated in our prior opinion and will not be repeated here. *See* 608 F.2d at 642-43. Instead, we turn directly to the points of error raised by appellants, and address the facts as they relate to the issues now before us.

Appellants again argue that if they are forced to testify before the grand jury, their testimony would subject them to prosecution in a foreign country. They contend that their fifth amendment rights against self-incrimination have not been overcome by the grant of use immunity, and that the district court erred by refusing to allow them to present evidence to substantiate their fear of foreign prosecution. The district

court viewed our prior opinion in this case as holding that the fear of foreign prosecution cannot be considered as a defense to contempt for refusal to testify, and therefore did not allow evidence to be presented on that issue. 1st Supp. Record at 44. In order to protect their rights on appeal, appellants made a Joint Offer of Proof, in which they attempted to show that their fear of prosecution in Mexico was both real and legitimate. No objection to this offer was made by the Government. Appellants claim that our prior opinion does not foreclose the possibility that the fear of foreign prosecution can be a defense in this type of contempt proceeding, and argue that their offer of proof is sufficient to establish a prima facie case of that defense.

In our prior opinion, we relied on precedent to hold that the fear of foreign prosecution is not a defense to contempt for refusal to testify and "that a grand jury witness is adequately protected against the leak of his testimony by the district court's power to prevent such disclosure. *See* Fed.R.Crim.P. 6(e)." 608 F.2d at 643. *See In re Grand Jury Proceedings (Postal)*, 559 F.2d 234 (5th Cir. 1977) (Per Curiam), *cert. denied*, 434 U.S. 1062, 98 S.Ct. 1234 (1978); *In re Tierney*, 465 F.2d 806 (5th Cir. 1972), *cert. denied*, 410 U.S. 914, 93 S.Ct. 959 (1973). Even if we were to entertain such a defense in this circuit, *cf. In re Federal Grand Jury Witness (Lemieux)*, 597 F.2d 1166, 1168-69 (9th Cir. 1979) (Hufstedler, concurring specially), appellants' offer of proof has not presented a suffi-

cient showing that they will be prosecuted by a foreign sovereign or that the protections of rule 6(e) will be inadequate to prevent the disclosure of incriminating testimony. The trial court, therefore, committed no error in refusing to entertain appellant's defense.

Appellants also contend that the trial court erred by not considering their belated motions to quash their subpoenas. The subpoenas commanded

> the Respondents to appear in the United States District Court for the Western District of Texas to testify before the grand jury, and to produce certain records pertaining to the payment of bond fees to a professional bail bondsman between 1975 and 1978. Each subpoena further contains the following statement. "These records may be turned over to any Special Agent of the Criminal Investigation Division, Internal Revenue Service, in lieu of a personal appearance."

Memorandum Opinion and Order, Record at 39-40.

Appellants claim that the language of the subpoenas made them subpoenas duces tecum and provided an alternate means of producing the requested documents that would render their personal appearances unnecessary. Appellants profess that they have no such records and argue, therefore, that the subpoenas should be quashed.

The district court considered the motion to quash untimely, observing that it was not pressed until after appellants had appeared before the grand jury, had been granted use immunity, and subsequently had been held in contempt twice. We need not determine whether the argument — that the subpoena should have been quashed — has relevance in a contempt proceeding brought about by the witness's refusal to answer the grand jury questions. *Cf. In re Grand Jury Proceedings (Schofield)*, 486 F.2d 85, 91 (3d Cir. 1973) (holding that a 28 U.S.C. §1826 contempt proceeding is an appropriate opportunity to present all defenses available for refusing to obey a subpoena).

A subpoena duces tecum can require an individual to testify even if it contains no language specifically commanding the personal appearance of the witness before the grand jury. *See Wilson v. United States*, 221 U.S. 361, 31 S.Ct. 538 (1910). Thus, even if we were to read these subpoenas purely as subpoenas duces tecum, the appellants could be required to testify. Here, however, the subpoenas specifically commanded the appellants to appear before the grand jury and to testify. Alternatively, the subpoenas provided that the appellants' production of the requested documents to the IRS would excuse their personal appearances. The alternative was not persued, so the appellants were still subject to the order to appear before the grand jury.

The appellants were not held in contempt for their failure to produce the documents they now say they do not possess. Their contempt citations stemmed from their failure to answer questions concerning the crash of an airplane loaded with marijuana near Marfa, Texas. Whether or not the appellants possessed the documents requested in the subpoena is irrelevant to their contempt convictions.

Appellants' final contention is that the Government did not sufficiently deny its involvement in any electronic surveillance of appellants. In their second contempt hearing, appellants claimed that the questions propounded to them by the grand jury were the result of illegal wiretaps, 25 U.S.C. §2515 (1976). If this were true, appellants would have "just cause" within the meaning of the contempt statute for refusing to testify. *Gelbard v. United States*, 408 U.S. 41, 92 S.Ct. 2357 (1972). In light of an allegation that the grand jury questioning is prompted by illegal wiretaps, the Government is required to make an adequate denial. *Beverly v. United States*, 468 F.2d 732, 751-52 (5th Cir. 1972). Whether the Government's denial is "adequate" will depend upon the specificity of the claim of illegality. *United States v. Tucker*, 526 F.2d 279, 281-82 (5th Cir.), *cert. denied*, 425 U.S. 958, 96 S.Ct. 1738 (1976), *United States v. Stevens*, 510 F.2d 1101, 1105-06 (5th Cir. 1975). Here, the district court summarized the appellants' claims:

> . . . The claims of Scarborough and Brummitt in this case consist solely of Scarborough's unsworn motion for disclosure of electronic surveillance; a sworn motion to quash by Scarborough, alleging upon "information and belief" that the Government has engaged in illegal wiretaps; a list of telephone numbers associated with the Respondents and their attorneys, both past and present; and an exhibit disclosing that one attorney for one of the Respondents has had his telephone toll records subpoenaed by the grand jury.

Memorandum Opinion and Order, Record at 42.

The Government's response was an affidavit that stated that no electronic surveillance of appellants originated from a federal agency in the Western District of Texas during the time in question, and that the questions propounded to the appellants were the product of the investigation into the crash of the marijuana-laden airplane; the Government was unable to advise the court whether any electronic surveillance had been conducted outside the Western District of Texas. Record at 38. Appellants argue that this qualification prevented the Government's response from being a sufficient denial of illegal activity, and ask this court to remand this issue to the district court for further proceedings. We find this unnecessary. We agree with the district court that, in light of the unsubstantiated nature of appellants' claims, the Government's denial was sufficient.

Accordingly, the convictions are AFFIRMED.

APPENDIX E

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS,
EL PASO DIVISION

IN RE: GRAND JURY PROCEEDINGS
(DAVID BRUMMITT) NO. ____

IN RE: GRAND JURY PROCEEDINGS
(JACK SCARBOROUGH) NO. ____

JOINT OFFER OF PROOF

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes David Michael Brummitt and Jack Scarborough, witnesses and appellants in the above entitled and numbered causes, by and through their attorneys of record, Thomas A. Rabette and Joseph (Sib) Abraham, Jr., and jointly make the following Offer of Proof pursuant to this Court's prior refusal to allow them to actually present this evidence:

a. That the questions would have disclosed Mexican crimes;

   i. That Mexican Criminal Law prohibits such activities and prescribes harsh criminal punishments;

   ii. That Mexican Criminal Law can encompass in absentia prosecutions;

   iii. That the Republic of Mexico would not feel itself bound by immunity granted by the United States;

   iv. That the Republic of Mexico does not have a privilege against self-incrimination, so that if these matters were to become known even generally, the Appellant might be compelled to give testimony against himself under penalties which this Appellant would prefer not to describe;

   v. That Mexican Courts will not examine how the person of a Defendant was brought before them;

b. That the questions obviously subjected him to such prosecution, and even if reworded would raise the specter of waiver of his Fifth Amendment rights;

c. That the press was closely covering this Grand Jury in general, and this Appellant's testimony in particular, even to the point of reporting snatches of conversations between himself and Counsel conferring outside the Grand Jury Room;

d. That the United States Attorney and his Assistants had exacerbated this "inquiry

by headline" through leaking information about the matters which were occurring within the Grand Jury, sometimes in attributed interviews;

e. That the United States Attorney could lawfully leak information of this Appellant's Grand Jury testimony to the appropriate Federal Administration, the Drug Enforcement Administration, under F.R.Cr.P. 6(e)(2);

f. That the Drug Enforcement Administration in El Paso, Texas, a city located on the Mexican border, cooperates closely and shares information with Mexican Drug Enforcement Agencies;

g. That neither the Government, (RI 18, et seq), nor the Court, (RI 18, et seq), would guarantee they would oppose any attempt to release this information to a foreign nation, but only that a hearing would be held prior to release, (RI 24);

h. That Appellant's Grand Jury testimony would be mandatorily released under 18 U.S.C. §3500 to any Defendant against which these Appellants might be required to give evidence.

Respectfully submitted,

/s/ Joseph (Sib) Abraham, Jr.
JOSEPH (SIB) ABRAHAM, JR.
Attorney for Appellant
Brummitt
505 Caples Building
El Paso, Texas 79901
(915) 532-1601

THOMAS A. RABETTE
Attorney for Jack
Scarborough
2242 S. Telegraph Road
Bloomfield Hills, Mich. 48013
(313) 333-7931

CERTIFICATE OF SERVICE

The undersigned attorney certifies that he has served a copy of the foregoing pleading upon the Attorney of Record for all other parties in this action, this 18th day of December, 1979.

/s/ Charles Louis Roberts
CHARLES LOUIS ROBERTS

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

IN RE: GRAND JURY PROCEEDINGS

JACKIE WAYNE SCARBOROUGH,
CAUSE NO. EP-79-CR-156

DAVID MICHAEL BRUMMITT,
CAUSE NO. EP-79-CR-157

AFFIDAVIT

After being sworn the affiant Ronald P. Guyer states and affirms the following:

1. I am an Assistant United States Attorney for the Western District of Texas and have been since March 17, 1975.

2. I am the attorney of record for the United States for the causes now before the court involving David Michael Brummitt and Jackie Wayne Scarborough.

3. The allegation has been made that there may have been "wire taps" on the telephones utilized by these individuals or their attorneys of record Joseph

Abraham and Charles Roberts for David Michael Brummitt and Thomas Rabette and Paul G. Valentino for Jackie Wayne Scarborough.

4. There has been no "wire tap" or electronic surveillance on the above-named individuals originating from a federal agency in the Western District of Texas during the time period involved, being March 1976 to the present.

5. The origin of questions to be asked of Daniel Michael Brummitt and Jackie Wayne Scarborough stem from the crash of an airplane near Presidio, Texas, in March of 1976 and the resulting investigation.

6. Affiant has sought additional confirmation from the Department of Justice as to the existence of electronic surveillance of the individuals listed above. The Government is unable to advise the court at this time of electronic surveillance conducted outside the Western District of Texas.

/s/ RONALD P. GUYER
RONALD P. GUYER
Assistant United States
Attorney
655 East Durango Boulevard
San Antonio, Texas 78206
(512-229-6528)

Signed and sworn to before me this 21st day of December, 1979.

/s/ HELEN L. JEMISON
Notary Public

My commission expires on 6-11-81.
/s/ HELEN L. JEMISON

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Affidavit was mailed, postage prepaid, to:

Joseph Abraham, Jr., Esq.
505 Caples Building
El Paso, Texas 79901

Thomas A. Rabette, Esq.
2242 South Telegraph
Bloomfield Hills, Michigan 48013

this 21st day of December, 1979.

/s/ RONALD GUYER
RONALD P. GUYER
Assistant United States
Attorney